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In The

Supreme Court of the United States

October Term, 1995

SHELDON FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK and d/b/a HOLIDAY WOODS MOBILE HOME PARK,

Petitioner,

v.

JON CATERINO; ROLAND HARMES, Director, Michigan Department of Natural Resources; VERNICE DAVIS ANTHONY, Director, Michigan Department of Public Health,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITIONER SHELDON FUTERNICK'S PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITIONER SHELDON FUTERNICK'S PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Pursuant to Supreme Court Rule 15.6, Petitioner Sheldon Futernick submits this reply brief in support of the petition for writ of certiorari that he filed on July 18, 1996. In the interest of brevity, only new matters and the most salient misstatements contained in Respondents' Brief dated September 16, 1996 ("Respondents' Brief") are replied to in this brief.

ARGUMENT

1. In Its Prior Decisions, This Court Has Not Squarely Addressed Whether Selective Enforcement of the Law Motivated by Malice or Bad Faith Violates the Equal Protection Clause, But *Oyler v Boles* Implicitly Rejects the Decision Below.

In his petition, Mr. Futernick asks this Court to resolve a conflict between the circuits as to whether the Equal Protection Clause is violated when a state official selectively enforces the law motivated by malice or bad faith. Respondents contend that this Court has already addressed this issue in *Oyler v Boles*, 368 U.S. 448 (1962). *See* Respondents' Brief at 5. In *Oyler*, criminal defendants who had been sentenced under a habitual offender statute claimed that they had been denied the equal protection of the laws simply because criminal defendants in other cases with greater numbers of felonies were not sentenced under the statute. This Court noted that the

defendants in *Oyler* had not alleged that the application of the habitual offender statute against them was the result of a decision to proceed "only in a certain class of cases or against *specific persons*." *Id.* at 456 (emphasis added). Finding that there was no allegation that the selection was based "upon an unjustifiable standard such as race, religion, or other arbitrary classification," the Court held that there had been no violation of the Equal Protection Clause. *Id. Oyler* did not squarely address the issue of whether selective enforcement motivated by malice or bad faith violates the Equal Protection Clause. However, the general test enunciated in *Oyler* as violative of the Equal Protection Clause – "selection . . . deliberately based upon an unjustifiable standard" – would certainly be satisfied by allegations of bad faith or malice.

Thus, far from supporting Respondents' position, *Oyler* implicitly rejects it. By correcting the Sixth Circuit's deviation from the broad principle recognized in *Oyler*, this Court's grant of review in the present case would not only resolve a conflict between six Courts of Appeals, but would serve the additional interest of reversing a decision that addressed "an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

2. The Court of Appeals Did Not Base Its Affirmance of the Dismissal of Claims Against Respondent Caterino on the Grounds of Qualified Immunity.

Respondent Caterino contends that, even if this Court were to reverse the Court of Appeals on the issue

of whether allegations of bad faith or malice state a claim for the unequal protection of the law, he would still be entitled to a dismissal of claims under his defense of qualified immunity. Respondents' Brief at 7. Respondent Caterino's theory is that the Court of Appeals addressed his contention that he had not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*[1]

Respondent Caterino plainly errs, because the Court of Appeals did not affirm the dismissal of claims against him on the grounds of qualified immunity. The Court of Appeals observed in a footnote that the defense of qualified immunity requires a showing of (i) a violation of a constitutional right (ii) of which a reasonable official in his situation would have been aware. 78 F.3d at 1056, n.6. The Court then reasoned that, since a holding that Mr. Futernick had failed to state a claim would necessarily include a holding that Caterino had not violated a constitutional right of which a reasonable official would have been aware, "it seems prudent to address the 12(b)(6) dismissal first." *Id.*

That brief footnote – without any discussion of case law or other authorities – is the *only* mention of qualified immunity in the entire opinion. The footnote makes clear

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[1] Respondent Caterino's theory applies only to him and not to the other Respondents, who, as directors of governmental agencies, are being sued solely for prospective injunctive relief – not for money damages – and as to whom the defense of qualified immunity does not apply. *E.g., Williams v Kentucky*, 24 F.3d 1526, 1541 (6th Cir. 1994) ("qualified immunity only immunizes defendants from monetary damages").

that the Court of Appeals was *only* addressing the F.R.Civ.P. 12(b)(6) issue – whether Mr. Futernick had stated a claim for a violation of the Equal Protection Clause – not qualified immunity, which Caterino had characterized as a F.R.Civ.P. 12(b)(1) issue. (R. 5: Motion to Dismiss Public Health Defendants at 2). Elsewhere in the opinion, the Court of Appeals reiterated that the sole basis for affirming dismissal was that "Futernick fails to state a claim upon which relief can be granted." 78 F.3d at 1055. Notably, there is no statement in the opinion that the dismissal was based on the alternative grounds of qualified immunity.

Since the Court of Appeals did not rest its decision, either in whole or even in part, on the grounds of qualified immunity, it would have been inappropriate for Mr. Futernick to seek review of that issue in this Court. This Court ordinarily declines to review issues not discussed in the Court of Appeals' decision. *E.g., Carden v Arkoma Assoc.*, 494 U.S. 185, 197 (1990). If review is granted on the equal protection issue and the Court of Appeals is reversed on that issue, the appropriate procedure would be for this Court to remand to the Court of Appeals, which can then address the qualified immunity issue.

Respondent Caterino attempts to argue that he will prevail on qualified immunity grounds, because the constitutional right asserted by Mr. Futernick was not recognized at the time of Caterino's actions in late 1992. Respondents' Brief at 8. While this argument should await remand to the Court of Appeals, the short answer is that the constitutional right asserted by Mr. Futernick *was* recognized prior to Caterino's action. *See Burt v City of New York*, 156 F.2d 791 (2d Cir. 1946); *Yerardi's Moody St.*

Restaurant v Board of Selectmen, 932 F.2d 89 (1st Cir. 1991); *FSK Drug Corp. v Perales*, 960 F.2d 6 (2d Cir. 1992); *cf. Oyler v Boles*, 368 U.S. 448 (1962). The only decision calling into question such a right is the Court of Appeals' decision in this case.[2]

3. There Is No Independent Basis for Affirming the Dismissal as to the Other Respondents.

Respondents Harmes and Anthony, who were sued in their respective capacities as Directors of the Michigan Department of Natural Resources and the Michigan Department of Public Health, contend that the Eleventh Amendment provides an alternative basis for affirming the dismissal of claims for prospective injunctive relief as to them. Respondents' Brief at 9.

However, the Court of Appeals expressly rejected this contention, holding that "the state agency defendants are not entitled to Eleventh Amendment immunity. . . . " 78 F.3d at 1055. In fact, the Court of Appeals stated that

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[2] Misleadingly, Caterino argues that this Court, in *Siegert v Gilley*, 500 U.S. 226 (1991), held that "official action motivated by malice and bad faith did not violate the constitution. . . . " Respondents' Brief at 8. In fact, *Siegert* held that the writing of a disparaging letter with malice by a governmental hospital supervisor to plaintiff's prospective employer did not violate the Due Process Clause. 500 U.S. at 234. The analysis focussed entirely on whether plaintiff had a "liberty" interest cognizable under the Due Process Clause. *Id.* at 233-234. The case did not purport to discuss the Equal Protection Clause at all, much less the more limited universe of selective enforcement.

Respondents' argument in support of their claim to Eleventh Amendment immunity was "ridiculous." *Id.* at 1055, n.5.

Had Respondents desired to bring this issue before the Court, the appropriate procedure to follow would have been to file a cross-petition or conditional cross-petition for certiorari. Supreme Court Rule 12.5. Respondents' failure to do so only confirms that the Court of Appeals' decision on the Eleventh Amendment issue does not merit review.

4. The Issue of Improper Motive Was Properly Raised in This Case.

Respondents argue that Petitioner did not raise the issue of improper motive in the district court. Respondents' Brief at 16.

Simply put, this is untrue. Certainly, the Court of Appeals believed that the issue had been raised in the district court, because it decided the improper motive issue, notwithstanding Respondents' contention in the Court of Appeals that the issue had not been raised in the district court. *See* Brief on Appeal of Jon Caterino and Michigan Department of Public Health, Vernice Davis Anthony, Director, dated March 15, 1995 at 22-23.

The complaint alleged that Respondents had engaged in "arbitrary and discriminatory action against Futernick," and requested a declaration that Respondents had "selectively enforced applicable laws and regulations and have purposefully discriminated against Futernick in violation of his right to equal protection of the law. . . . " (R. 1: Verified Complaint at 12, 21). Under principles of

notice pleading – where the failure to mention talismanic labels is not fatal – the allegations made in that district court pleading were plainly sufficient. *See, e.g., Conley v Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

Moreover, the voluminous briefs filed in the district court – one of which Respondents noted (Respondents' Brief at 2) was accompanied by a binder containing "some 500 pages" of documentary evidence – unquestionably were directed to demonstrating improper motive. *See, e.g.*, Plaintiff's Supplemental Brief in Response to Motions to Dismiss at 13-25 (R. 36), which set forth "the demonstrated evidence that Caterino has subjected Futernick to disparate treatment from that accorded other area mobile home parks and has discriminated against him in a manner violative of the Equal Protection Clause. . . . "

In any event, even if Respondents' contention were true, the Court of Appeals' decision in this case has created an intolerable conflict between the circuits. The Sixth Circuit, having rejected Respondents' contention that the improper motive issue had not been raised in the district court, has now issued an opinion that is at variance with the law in five other circuits. Even if the Sixth Circuit was wrong about whether the issue of improper motive had been raised in the district court, this Court should grant review so as to address this fundamental issue and resolve the conflict.

CONCLUSION

For the above reasons and the reasons stated in his Petition, Mr. Futernick respectfully requests that the Court grant the writ.

Respectfully submitted,

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